IN THE

Supreme Court of the United States

October Term, 1975

RECEIVED
JUL 16 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 75-96

COLONIAL REALTY CORPORATION,

Petitioner,

against

JOHN MacWILLIAMS, JR., JAMES E. BRENNAN and COLONIAL PENN GROUP, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM E. HAUDEK
Attorney for Petitioner
295 Madison Avenue
New York, N.Y. 10017
(Tel.: 212-532-4800)

ABRAHAM L. POMERANTZ,
RICHARD M. MEYER,
A. ARNOLD GERSHON,

POMERANTZ LEVY HAUDEK & BLOCK
Of Counsel

July 16, 1975

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
I. The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision	4
II. The decision below, cutting two days from the statutory six-month period, is contrary to the context of § 16(b), its legislative history, and all pertinent authorities	7
The importance of the question	7
The language and interpretation of the statute	8
Legislative materials	10
Judicial interpretation	11
Interpretation by the SEC	13
CONCLUSION	14
Appendix A—Opinion of the Court of Appeals	1a
Appendix B—Judgment of the Court of Appeals	3a
Appendix C—Opinion of the District Court	4a
Appendix D—Order Extending Time to Apply for Certiorari	7a

PAGE

Appendix E—Statutes and Regulations 8a

Section 16(b) of the Securities Exchange Act of 1934, 15 USC § 78p(b) 8a

Rule 16b-6(a) and (b) of the Securities and Exchange Commission, 17 CFR 240.16b-6(a) and (b) 9a

Rule 16a-1(e) of the Securities and Exchange Commission, 17 CFR 240.16a-1(e) 9a

Table of Cases

Adler v. Klawans, 267 F. 2d 840 (2d Cir. 1959) .. 6, 10

Babbitt, Inc., B.T., v. Lachner, 332 F.2d 255 (2d Cir. 1964) 12

Becker v. C.I.R., 378 F. 2d 767 (3d Cir 1967) 8, 9

Blau v. Max Factor & Co., 342 F. 2d 304 (9th Cir.), cert. denied, 392 U.S. 892 (1965) 8

Booth v. Varian Associates, 334 F.2d 1 (1st Cir. 1964), cert. denied, 379 U.S. 961 (1965) 12

Burnet v. Willingham L. & T. Co., 282 U.S. 437 (1931) 8, 9

Calaf v. Gonzalez, 127 F. 2d 934 (1st Cir. 1942) .. 5

Champion Home Builders Co. v. Jeffress, 490 F. 2d 611 (6th Cir.), cert. denied, 416 U.S. 986 (1974) 7

Diamond v. Oreamuno, 24 N.Y. 2d 494, 248 N.E. 2d 910, 301 N.Y.S. 2d 78 (1969) 8

Heli-Coil Corp v. Webster, 352 F.2d 156 (3rd Cir. 1965) 12

PAGE

Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973) 12

Morales v. Walt Disney Productions, 361 F. Supp. 1157 (S.D.N.Y. 1973) 13

Petteys v. Butler, 367 F. 2d 528 (8th Cir. 1966), cert. denied, 385 U.S. 1006 (1967) 8, 12

Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418 (1972) 6, 12

Rheem Manufacturing Co. v. Rheem, 295 F. 2d 473 (9th Cir. 1961) 6

Sheets v. Selden's Lessee, 2 Wall. (69 U.S.) 177 (1865) 8, 9

Smolowe v. Delendo Corp., 136 F. 2d 231 (2d Cir.), cert. denied, 320 U.S. 751 (1943) 6

Stella v. Graham-Paige Motors Corp., 132 F. Supp. 100 (S.D.N.Y. 1955, Dimock, J.), remanded, 232 F. 2d 299 (2d Cir.), cert. denied, 352 U.S. 831 (1956) ..... 3, et passim

Udall v. Tallman, 380 U.S. 1 (1965) 13

United States v. Byrum, 408 U.S. 125 (1972) 5

Authorities

Cook and Feldman, Insider Trading under the Securities Exchange Act, 66 Harv. L. Rev. 385, 409 (1953) 9

Revenue Ruling 70-598, Cumul. Bull. 1970-2, p. 168 9

Securities Exchange Act Release No. 4509, '48-'52 CCH Fed. Sec. L. Rep. ¶ 76,080 (1950) 13

Senate Committee on Banking and Currency, S.R. 792, 73rd Cong., 2d Sess. (1934) 7, 11

PAGE

Stock Exchange Practices, Hearings on S. Res. 84 (72d Cong.), S. Res. 56 and 97 (73d Cong.) before the Committee on Banking and Currency, United States Senate, 73d Cong., 1st and 2d Sess. (1934) 10

Stock Exchange Regulation, Hearing on H.R. 7852 and H.R. 8720 before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Cong., 2d Sess. (1934) 10, 11

Statutes and Regulations

Bankruptcy Act

§ 31, 11 USC § 54 8

Federal Rules of Civil Procedure

Rule 6(a) 8

Internal Revenue Code

26 USC § 1222 9

Judicial Code

28 USC § 1254(1) 2

Rules under the Securities Exchange Act of 1934

Rule 16a-1(e), 17 CFR 240.16a-1(e) 13, 9a

Rule 16b-6(b), 17 CFR 240.16b-6(b) 13, 9a

Securities Exchange Act of 1934

§ 12, 15 USC § 781 2

§ 16(b), 15 USC § 78p(b) .....1, 8a, et passim

§ 27, 15 USC § 78aa 2

IN THE

Supreme Court of the United States

October Term, 1975

No.

COLONIAL REALTY CORPORATION,

Petitioner,

against

JOHN MACWILLIAMS, JR., JAMES E. BRENNAN and COLONIAL PENN GROUP, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In this action to recover insiders' short-swing profits under § 16(b) of the Securities Exchange Act of 1934 (the "Act"), petitioner Colonial Realty Corporation, plaintiff-appellant below, prays this Court for a writ of certiorari to review the judgment of the Second Circuit entered March 20, 1975.

Opinions Below

The opinions of the Second Circuit (Appendix A, p. 1a below) and of the District Court for Southern New York (Appendix C, p. 4a below) are reported, respectively, at 512 F. 2d 1187 and 381 F. Supp. 26.

Jurisdiction

The judgment of the Second Circuit (Appendix B, p. 3a below) was dated and entered March 20, 1975. By order of June 6, 1975 (Appendix D, p. 7a below), this Court, Mr. Justice Marshall, extended the time for filing a petition for certiorari to and including July 17, 1975. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

The jurisdiction of the District Court rested on § 27 of the Act.

Question Presented

Is a corporate officer liable under § 16(b) of the Securities Exchange Act for his profits derived from selling his company's stock and repurchasing it six months minus a day later?

Statutes and Regulations Involved

The relevant text of § 16(b) of the Act and of certain SEC regulations appears in Appendix E, p. 8a below.

Statement of the Case

The complaint alleges that petitioner is a stockholder of defendant Colonial Penn Group, Inc. (the "Corporation"). Defendants MacWilliams and Brennan ("defendants") are officers of the Corporation. Each of them, it is alleged, sold shares of the Corporation's common stock (registered under § 12 of the Act) and repurchased all or part thereof, at a profit, six months minus a day after the sale.*

* MacWilliams sold 50,000 shares on December 20, 1972 and purchased 45,000 shares on June 19, 1973. Brennan sold 4,000 shares on December 22, 1972 and purchased 5,000 shares on June 21, 1973.

Following a futile demand that the Corporation sue defendants for their profits, petitioner brought this action on behalf of the Corporation. Defendants moved, without affidavit, to dismiss the complaint for failure to state a claim, on the theory that their transactions did not occur within the statutory period of "less than six months". The District Court (Gurfein, J.) indicated that it might have denied the motion had it approached the problem in the first instance (6a); but it felt "constrained" by *stare decisis* (*ibid.*) to dismiss the complaint in accordance with the rule announced in *Stella* v. *Graham-Paige Motors Corp.*, 132 F. Supp.. 100, 103-104 (S.D.N.Y. 1955), *remanded*, 232 F. 2d 299 (2d Cir.), *cert. denied*, 352 U.S. 831 (1956). The Second Circuit affirmed Judge Gurfein's decision upon his opinion and upon Chief Judge Kaufman's brief remarks from the bench.

The decisions below, following the District Court in *Stella*, would reduce the statutory holding period to six months minus two days. Petitioner contends that it is six months; but even if it be one day less, defendants are liable.

Reasons for Granting the Writ

The Court of Appeals did not just purport to decide an isolated, individual controversy. It deliberately issued its opinion "[i]n order to afford our decision precedential value * * * and conclusively to resolve this question within our circuit" (2a). Unless reviewed by this Court, the decision below will thus effectively become the law of the land and will henceforth determine the interpretation of the six-month clause of the statute. Review by this Court is needed not only to correct the error of the decision below in interpreting an important provision of the securities

laws, but because the improper way in which the Court below approached and resolved the issue calls for the exercise of this Court's supervisory power.

I.

The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This case presented the Court below with a clearcut, novel and serious question of statutory interpretation. No previous appellate court had undertaken to resolve it. Nevertheless, the Court below did not even attempt to find the correct answer. It did not try to interpret the language of the statute. It did not seek to determine the intention of Congress in an area of grave national concern. It ignored the legislative materials. It passed in silence over familiar principles governing the computation of time. It did not devote a word to the expressions of this Court, of other courts and of the SEC, which might have given it guidance. The fact—hard to believe but demonstrable—is that the Court below thought a legally correct result was unnecessary.

Significantly, Judge Gurfein had stated that, as a matter of first impression, he might well have sustained the complaint (6a). By adopting his opinion, the Court of Appeals agreed with this statement. It recognized, therefore, that the correct interpretation of the statute presents, to say the least, a serious question.

But neither the Court of Appeals nor the District Court purported to find an answer to that question. As noted, Judge Gurfein in the District Court felt "constrained" by *stare decisis* to adopt the *Stella* rule (6a). Whether

or not he was right, certainly the Court of Appeals was under no such constraint. *Stella* was only a District Court decision, and dictum at that; its interpretation of the six-month clause of the statute was neither affirmed nor approved on appeal.* It is elementary that a district court decision cannot operate as *stare decisis* on a court of appeals—just as a lower court decision cannot bind this Court as *stare decisis*. *United States* v. *Byrum*, 408 U.S. 125, 134 (1972); *Calaf* v. *Gonzalez*, 127 F. 2d 934, 938 (1st Cir. 1942). After all, it is the very purpose of appellate tribunals to review and, if necessary, correct the legal views of lower courts, not to be bound by them. By blandly following the District Court's dictum in *Stella* without determining whether or not it was correct, the Court below fell grievously short in the performance of its tasks as an appellate court.

None of the grounds advanced by the Court of Appeals in support of *stare decisis* (2a) has substance. In the first place, we are told that the *Stella* principle—

> "has not proved unworkable or difficult to apply, nor does it do any violence to the central purpose of the securities law, since the six-month requirement it implements is essentially an arbitrary legislative guidepost." (2a)

---

* The *Stella* insiders purchased their stock on February 10, 1947 and resold it on and before August 7 (132 F. Supp. at 106). It made, therefore, no difference whether the statutory period was a full six months or two days less, for even on the latter view, the last day of the period was August 8 (*ibid.*). *Stella's* excursion into statutory interpretation was thus gratuitous and pure dictum.

Nor was the District Court's dictum approved on the *Stella* appeal. Judge Frank agreed, of course, that "sales made before August 8, 1947 [i.e. the sales actually made] were within the statutory period" (232 F.2d at 301; interpolation added); but he did not imply that later sales, e.g. on August 8, 9 or 10, would have been immune. Indeed, even on the District Court's view, a sale on August 8 would have been within the statute (132 F. Supp. at 105).

Of course, all statutory time limitations are "arbitrary" —the statute of limitations, the time to appeal, and countless others. If a lower court were to rule that the appeal period is 31 days, a higher court would correct the error even though the statutory 30 days are "arbitrary" and 31 days might be equally "workable". If *Stella's* computation of the 16(b) holding period was in error, its perpetuation by the Court of Appeals is not excused because Congress might have chosen a different period that might also have been workable. The choice of the proper period was for Congress, not for the Court below or for the District Court in *Stella*. Whether or not the choice made by Congress goes to "the central purpose" of the securities laws, is of no moment. In either case it was the duty of the Court of Appeals to ascertain and effectuate the Congressional intent, not to brush it aside as unimportant. That duty was the more insistent since public policy requires the strict enforcement of § 16(b).*

The statement below that *Stella* "has been followed for almost two decades" (2a) is simply wrong; except for a single dictum, the *Stella* principle has never before been followed.** The inevitable citations of *Stella* by a number of legal writers (2a) did not relieve the Court below of its responsibility to undertake its own critical evaluation of the statute.

---

* Section 16(b) is "remedial" and "must be strictly construed" against the profiting insider so as "to squeeze all possible profits out of [his] stock transactions". *Adler* v. *Klawans*, 267 F. 2d 840, 846-47 (2d Cir. 1959, by Judge, now Chief Justice, Burger); *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 239 (2d Cir.), *cert denied*, 320 U.S. 751 (1943). Both cases were cited with approval in *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 422 (1972).

** The dictum is in a footnote to *Rheem Manufacturing Co.* v. *Rheem*, 295 F. 2d 473, 475, n. 3 (9th Cir. 1961). The Court there dismissed a 16(b) claim not because the statutory six-month holding period had run, but because the defendant had acquired the securities "in good faith in connection with a debt previously contracted."

Finally, the Court of Appeals suggested that defendants should not be "penalized for patterning their transactions after the formulation announced in *Stella*" (2a). The record does not contain the slightest hint that defendants relied on *Stella*; but it would make no difference if they did. An insider foolhardy enough to engage in a two-day gamble on no firmer ground than the single district court dictum in *Stella* is not entitled to protection; he is "deemed capable of structuring his dealings to avoid any possibility of taint and therefore must bear the risks of any inadvertent miscalculation", *Champion Home Builders Co.* v. *Jeffress*, 490 F. 2d 611, 619 (6th Cir.), *cert. denied*, 416 U.S. 986 (1974). But even if defendants could claim some sympathy, it would afford no ground to perpetuate an erroneous interpretation of the statute for all times to come.

The Court below has elevated a single district court dictum to become the law of the land. In doing so, it did not give even passing consideration to the merits of the statutory question before it. The Court thus abdicated its responsibilities as an appellate tribunal. Its procedure, we submit, urgently calls for review by this Court.

II.

The decision below, cutting two days from the statutory six-month period, is contrary to the context of § 16(b), its legislative history, and all pertinent authorities.

The importance of the question

Section 16(b) is an integral part of a comprehensive statutory scheme designed to protect the securities markets from manipulation and deceit; *Senate Committee on Banking and Currency*, S.R. 792, 73rd Cong., 2d Sess. (1934),

p. 6. The six-month provisions of § 16(b) is the cornerstone of the legislative plan. Even at the common law, a corporation's fiduciary had to surrender any profits he derived from the abuse of inside information, *Diamond* v. *Oreamuno*, 24 N.Y. 2d 494, 248 N.E. 2d 910, 301 N.Y.S. 2d 78 (1969); but the extreme difficulty of proving the actual use of inside information rendered the common law rule ineffective. Congress dispensed, therefore, with the proof of subjective factors and based liability simply upon the period of time between the insider's purchase and sale of securities. It was the judgment of Congress that an insider making a short-swing trade was so likely to be acting on inside information that his liability should be conclusively presumed.* The fixing by Congress of the period as six months was thus a crucial policy decision entitled to strict judicial enforcement. Since the decision below would undermine the congressional policy, it should be reviewed by this Court.

The language and interpretation of the statute

It is elementary that a time period running from a specified event is computed by excluding the day of the event and by including the last day of the period. *Burnet* v. *Willingham L. & T. Co.*, 282 U.S. 437, 439 (1931, Holmes, J.); *Sheets* v. *Selden's Lessee*, 2 Wall. (69 U.S.) 177, 190 (1865).** In *Stella*, however, Judge Dimock turned the rule on its head: He included the day of the initial securities transaction in the statutory six months; he excluded the last day of the six months; and in this fashion cut two days

* See, e.g., *Petteys* v. *Butler*, 367 F. 2d 528, 532 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967); *Blau* v. *Max Factor & Co.*, 342 F. 2d 304, 308 (9th Cir.), *cert. denied*, 392 U.S. 892 (1965).

** The rule is embodied in § 31 of the Bankruptcy Act, 11 USC § 54, and in Rule 6(a) FRCP, and has been universally followed by the lower courts, e.g., *Becker* v. *C.I.R.*, 378 F.2d 767, 769 (3d Cir. 1967).

from the six months, one at the beginning and one at the end of the period (132 F. Supp. at 103-104). We submit that he erred on both counts.

The statute, to be sure, refers to a purchase and sale "within" less than six months; but the word "within" does not mean, as Judge Dimock thought, that the statutory holding period starts running even before the insider purchases any securities he can hold. It simply means that the purchase and sale, to be actionable, must be "within any period of less than six months from each other."* The statutory period thus starts only *after* the day of the original transaction, in accordance with the general principle in *Burnet, supra* (282 U.S. at 439), and *Sheets, supra* (69 U.S. at 190).

Nor does the reference of the statute to a period of "less than six months" mean, as Judge Dimock thought, that a full day must be lopped off at the end of the six months. Since the last day of the six months runs until midnight, a sale prior to midnight, i.e., during the course of the last day, is within "less than six months".**

The contrary view of *Stella* is in direct conflict with the statute. Section 16(b) provides that an insider's liability

* This is how the Chairman and Special Counsel of the SEC read the provision. Cook and Feldman, *Insider Trading under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 409 (1953): "these transactions must be within six months of each other".

** The principle that the law disregards fractions of a day, relied on by Judge Dimock, is beside the point. It is "a figurative recognition of the fact that people do not trouble themselves without reason about a nicer division of time" (*Burnet, supra*, 288 U.S. at 440). For 16(b) purposes, it is unnecessary to trouble oneself about the nice divisions of a day; for whether the ultimate securities sale occurs at 10 A.M. or 4 P.M. of the last day of the six months, it is within "less than six months" from the initial purchase. For similar reasons, a period of "more than 6 months" (see 26 USC § 1222) does not mean six months plus one day but six months plus any fraction of time however short. *Becker* v. *C.I.R.*, *supra*, 378 F.2d at 769; Revenue Ruling 70-598, Cumul. Bull. 1970-2, p. 168.

shall be irrespective of his intention to hold the securities purchased "for a period exceeding six months". The clause clearly reflects the intent of Congress to impose liability unless the insider actually retains the securities purchased for more than six months.

But even if the statutory language were deemed ambiguous, the doubt would have to be resolved against the insider. As Judge (now Chief Justice) Burger held in *Adler* v. *Klawans*, 267 F.2d 840, 846-47 (2d Cir. 1959), section 16(b)—

> "is remedial, rather than penal, and • • • must be strictly construed in favor of the corporation and against any person who makes profit dealing in the corporation stock."

Legislative materials.

The legislative materials, although not extensive, all point in one direction.* Thomas Corcoran and Ferdinand Pecora were among the principal draftsmen of the Act (House Hearings 82-84; Senate Hearings 6463-65, 7703). Both men testified extensively. Mr. Pecora explained that an insider is permitted to profit from investments in his company—

> "provided his transactions are more than 6 months apart. • • • If he buys and does not sell again for another 6 months, he does not have to account." (Senate Hearings 7742).

---

* As herein used, "House Hearings" refers to *Stock Exchange Regulation*, Hearing on H.R. 7852 and H.R. 8720 before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Cong., 2d Sess. (1934).

"Senate Hearings" refers to *Stock Exchange Practices*, Hearings on S. Res. 84 (72d Cong.), S. Res. 56 and 97 (73d Cong.) before the Committee on Banking and Currency, United States Senate, 73d Cong., 1st and 2d Sess. (1934).

In the same vein, Mr. Corcoran stated that § 15 of the bill (H.R. 7852, the precursor of the present § 16) forbade an insider to—

> "get in and out of stock within six months. If he does, the profit goes to his company." (House Hearings 133).

Both explanations made it clear that the holding period was to be six months; neither suggested a diminution of the period by one or two days. Similarly, the *Senate Committee Report*, S. Rep. 792, 73d Cong., 2d Sess. (1934), pp. 20-21, stated that the bill called for the surrender of insider profits—

> "derived from sales and purchases *within a period of 6 months or less.*" (Emphasis added)

Against this legislative background, it would seem clear that Congress intended the statute to provide for a full six months' holding period.

To ascribe a different purpose to Congress would be unnatural and opposed to common sense. Granting that the six-month requirement is "essentially arbitrary" (2a), how much more arbitrary would it be to provide a holding period of six months minus two days! A legislative body setting an arbitrary time will naturally choose a round figure. Six months is a round figure; and it is hard to conceive of any reason why Congress should have selected a period as odd and unusual as six months minus two days.

Judicial interpretation.

It is thus no wonder that this Court as well as others have time and again described the 16(b) period as comprising six months, not six months minus one or two days.

In *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973), this Court said that liability under § 16(b) attaches—

> "for any profits realized from any purchase and sale or sale and purchase of stock occurring within a period of six months."

Reliance Electric Co. v. *Emerson Electric Co.*, 404 U.S. 418, 422 (1972):

> "A person avoids [16(b)] liability • • • if he sells more than six months after purchase."

The lower courts have used similar language. Thus, *B.T. Babbitt, Inc.* v. *Lachner*, 332 F.2d 255, 258 (2d Cir. 1964), held that a purchase of shares on November 5, 1958 and a sale on May 6, 1959 "exceeded six months—if only by one day." And see, *e.g.*, *Petteys* v. *Butler*, 367 F.2d 528, 531 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967) ("within six months after the date of purchase"); *Heli-Coil Corp.* v. *Webster*, 352 F.2d 156, 160 (3rd Cir. 1965) ("within a six-months' period"); *Booth* v. *Varian Associates*, 334 F.2d 1, 3 (1st Cir. 1964), *cert. denied*, 379 U.S. 961 (1965) ("within six months of the date of the purchase"). Indeed, in the very case at bar, the Court below referred to the "six-month requirement" of the statute (2a).

It may be true, as Judge Gurfein noted below (6a), that court and counsel in some of these cases did not give specific consideration to the issue here involved; but that is no ground to brush the cases aside. Coming from this Court and the Court of Appeals, repeated references to "six months" persuasively demonstrate that this is the natural and reasonable meaning of the statute, as it impresses itself on readers not given to the loose use of language. If that be true, it is a reasonable inference that the intent of Congress was the same.

Interpretation by the SEC.

In the construction of § 16(b), the views of the SEC, as the agency charged with the administration of the statute, are entitled to great deference; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Commission clearly considers the applicable period to be six full months, not one or two days less.

SEC Rule 16b-6, 17 CFR 240.16b-6 (quoted p. 9a below) deals with insider profits arising from the exercise of stock options and a corresponding stock sale; the Rule is designed to hold the insider liable only for his short-swing profit, not for the long-term appreciation of the option. *Sec. Exch. Act Release No. 4509*, '48-'52 CCH Fed. Sec. L. Rep. ¶ 76,080 (1950). Significantly, the Rule defines the short-swing period as "within six months before or after the date of sale"; Rule 16b-6(b). The Commission thus treated the short-swing period as "a period of six full months ending at midnight on the day of sale"; *Morales* v. *Walt Disney Productions*, 361 F. Supp. 1157, 1158 (S.D.N.Y. 1973). The same view is repeatedly expressed in the Commission's Release, *supra*:

> "Accordingly, under Section 16(b) the insider who has *held his investment for six months* is free to realize what he can from selling it." (pp. 78,756-57; emphasis added).
>
> "• • • the critical period for measuring short-swing aspects of profit derived from the exercise of an option is the *six months after the sale.*" (p. 78,758; emphasis added).

Similarly, Rule 16a-1(e), 17 CFR 240.16a-1(e) (quoted p. 9a, below), deals with a director who buys securities while still in office but sells them after he ceases being a director; he must report the sale if it "shall occur within

six months after'' the purchase. Again, the Commission considers the applicable period to be six full months, not one or two days less. It can hardly be suggested that, in framing these Rules, the Commission failed to focus on the precise boundaries of the statutory period.

Conclusion

All relevant factors—the context of § 16(b), its reasonable meaning, its legislative history, and the great weight of its judicial and administrative interpretation—point to a statutory period of a full six months. The Court below did not disagree. Nevertheless, it cut two days from the six-month period, defeating the intent of Congress and presenting a gift of two days to faithless fiduciaries. By its uncritical adoption of *Stella,* it permitted a District Court dictum to become a controlling precedent without giving even passing consideration to the correct interpretation of the statute. In this offhand fashion, the congressionally intended protection of investors has been dealt a serious blow.

The petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

WILLIAM E. HAUDEK,
Attorney for Petitioner
295 Madison Avenue
New York, New York 10017

ABRAHAM L. POMERANTZ,
RICHARD M. MEYER,
A. ARNOLD GERSHON,
POMERANTZ LEVY HAUDEK & BLOCK,
Of Counsel

Dated: July 16, 1975

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 596—September Term, 1974.
(Argued March 20, 1975 Decided March 20, 1975.)
Filed March 21, 1975.)
Docket No. 74-2280

COLONIAL REALTY CORPORATION,
Plaintiff-Appellant,

v.

JOHN MACWILLIAMS, JR., JAMES E. BRENNAN and COLONIAL PENN GROUP, INC.,
Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
SMITH, *Circuit Judge,* and MACMAHON, *District Judge.**

Appeal by Colonial Realty Corporation, from a judgment by the United States District Court for the Southern District of New York, Murray I. Gurfein, *Judge,* dismissing shareholder's derivative action because the sales and repurchases did not occur within periods of less than six months for purposes of § 16(b) of the Securities Act of 1934, 15 U.S.C. § 78p(b).

Affirmed.

* Of the Southern District of New York, sitting by designation.

WILLIAM E. HAUDEK, New York, New York (Pomerantz, Levy, Haudek & Block, New York, New York, on the brief; Richard M. Meyer, A. Arnold Gershon, New York, New York, of counsel), *for Appellant.*

SIMON H. RIFKIND, New York, New York (Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, on the brief; Morris B. Abram, Richard A. Mescon, Julie Kitzes Herr, New York, New York, of counsel), *for Appellee.*

PER CURIAM:

This case was affirmed in open court. In order to afford our decision precedential value,[1] however, and conclusively to resolve this question within our circuit, we issue this brief per curiam. We affirm for the reasons stated in open court,[2] and in Judge Gurfein's opinion below, 381 F. Supp. 26 (S.D.N.Y. 1974).

---

[1] Rule § 0.23 of the United States Court of Appeals for the Second Circuit provides in pertinent part:

. . .

> Where a decision is rendered from the bench, the court may deliver a brief oral statement . . . Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

[2] The statement delivered from the bench was as follows:

> We agree with Judge Gurfein that the rule announced in *Stella* v. *Graham Paige*—that transactions occurring on January 1 and June 30 do not fall within the statutory period of "less than six months"—is dispositive of this case. That principle has not proved unworkable or difficult to apply, nor does it do any violence to the central purpose of the securities law, since the six-month requirement it implements is essentially an arbitrary legislative guidepost. Moreover, every legal research tool an investor might consult, from Professor Loss's treatise to Jennings and Marsh has cited *Stella* as controlling authority.
>
> Under these circumstances, we believe that the doctrine of *stare decisis* is the wise policy. We do not believe that the defendants should be penalized for patterning their transactions after the formulation, announced in *Stella*, which has been followed for almost two decades. Accordingly, we affirm.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN, *Chief Judge.*
HON. J. JOSEPH SMITH, *Circuit Judge.*
HON. LLOYD F. MACMAHON, *District Judge.*

74-2280

COLONIAL REALTY CORPORATION,
Plaintiff-Appellant,

v.

JOHN MACWILLIAMS, JR., JAMES E. BRENNAN & COLONIAL PENN GROUP, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

Opinion of the District Court

BEST COPY AVAILABLE

COLONIAL REALTY CORPORATION,
Plaintiff,

v.

John MacWILLIAMS, Jr., et al.,
Defendants.

No. 74 Civ. 1818.

United States District Court,
S. D. New York.

Aug. 21, 1974.

Shareholder's derivative action was brought against two corporate officers. On corporate officer's motion to dismiss, the District Court, Gurfein, J., held that sale of stock on December 20 and repurchase of stock on the following June 19th by one officer and sale on December 22nd and repurchase on June 21st by second officer did not occur within periods of less than six months for purposes of statute prohibiting unfair use of information obtained by insiders on short-swing sales.

Motion to dismiss granted.

1. Securities Regulation ⇐111

Sale of stock by one corporate officer on December 20 and purchase of shares in the corporation on the following June 19 and sale by second corporate officer on December 22 and purchase on the following June 21, did not constitute short-swing sales within a period of "less than six months." Securities Exchange Act of 1934, § 16(b), 15 U.S.C.A. § 78p(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Courts ⇐96(7)

Although stare decisis is not so rigid as to require perpetuation of error, decision that phrase "less than six months" as applied to short-swing stock transactions does not include the date of sale was not so clearly in error as to require reconsideration. Securities Exchange Act of 1934, § 16(b), 15 U.S.C.A. § 78p(b).

3. Courts ⇐96(7)

Absent a showing of significant unworkability or injustice, determination of method of computing six-month period set out in statute which prohibits the unfair use of information obtained by insiders on short-swing sales was one on which investors had a right to rely. Securities Exchange Act of 1934, § 16(b), 15 U.S.C.A. § 78p(b).

Pomerantz Levy Haudek & Block, New York City, for plaintiff.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City, for defendants.

GURFEIN, District Judge:

This is a shareholder's derivative action brought by plaintiff in the name of Colonial Realty Corporation (Colonial) against two officers of Colonial Penn Group, Inc. (CPG). The complaint alleges that defendants MacWilliams (chief executive officer and chairman of

CPG's board of directors) and Brennan (CPG's senior vice president and treasurer) are liable to CPG pursuant to § 16(b) of the Securities Act of 1934, 15 U.S.C. § 78p(b) for profits realized in their short-swing sale and purchase of certain CPG securities. CPG has been joined as party defendant because of its failure to bring this action upon plaintiff's demand.

[1] Defendants MacWilliams and Brennan now move pursuant to Fed.R. Civ.P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted. The sole issue raised by their motion is whether the transactions complained of occurred within the statutory period of "less than six months." For the reasons stated below I conclude that they did not, and the motion to dismiss will therefore be granted.

The complaint establishes the following facts for purposes of this motion:

"6. Defendant MacWilliams sold 50,000 shares of Penn Group's common stock in the open market at $63.49 per share on December 20, 1972, and purchased 45,000 shares thereof by exercising an option at $6.86 per share on June 19, 1973.

"7. Defendant Brennan sold 4,000 shares of Penn Group's common stock in the open market at $62.13 per share on December 22, 1972, and purchased 5,000 shares thereof by exercising an option at $12.00 per share on June 21, 1973."

The relevant portion of section 16(b) provides:

"(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) *within any period of less than six months*, * * * shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. * * *" (Emphasis supplied.)

Plaintiff contends that a purchase of securities on the final day of a six-month period beginning with the date of a previous sale falls within this statutory scheme. This argument admittedly requests the court to overturn a rule established in this circuit some nineteen years ago in Stella v. Graham-Paige Motors Corp., 132 F.Supp. 100 (S.D.N.Y. 1955), remanded on other grounds, 232 F.2d 299 (2d Cir.), cert. denied, 352 U.S. 831, 77 S.Ct. 46, 1 L.Ed.2d 52 (1956).

In *Stella* the District Court interpreted the phrase "within a period of less than six months" as follows:

". . . Graham-Paige [the defendant] construes the words 'period of less than six months' to mean a period the first and last days of which each include the twenty-four hours from midnight to midnight, and the last day of which is the second day prior to the date corresponding numerically to that of the first day of the period in the sixth succeeding month. For example, the period from and including January 1st to and including June 29th would be a 'period of less than six months' but the period to and including June 30th would be a period of exactly six months. Thus profit realized from a purchase on January 1st and a sale on June 30th would not be recoverable under the statute.

"That construction is correct." 132 F.Supp. at 103–104.

The Court of Appeals approved this formulation in the following language: "We agree with the trial judge that the purchase of the stock occurred on Feb-

ruary 10, 1947, and that therefore sales made *before* August 8, 1947, were within the statutory period." 232 F.2d at 301 (Emphasis supplied).

Clearly, if this formulation is accepted here plaintiff's claim must fail, since the sale/purchase dates of both MacWilliams' and Brennan's transactions (Dec. 20/June 19 and Dec. 22/June 21, respectively) are patterned exactly after the formulation in *Stella*.

Plaintiff contends, however, that both courts were in error in that formulation because they included the initial purchase or sale date in measurement of the six-month period and because they took literally the statute's "less than" wording without giving adequate attention to the rest of the passage in which that phrase appears.

Although I might have accepted these arguments had I, rather than the Court of Appeals in *Stella*, approached this problem in the first instance, I now feel constrained by the doctrine of *stare decisis* to follow the rule established almost nineteen years ago.

[2] While plaintiff is certainly correct in asserting that *stare decisis* is not so rigid as to require perpetuation of error, I cannot agree that this is the kind of situation in which overturning an established principle is appropriate or desirable. Most importantly, the *Stella* formulation is by no means clearly in error.

Nor does the *Stella* rule suffer from any other deficiencies which might persuade me to reexamine it. On a practical basis, it has not proved unworkably difficult to apply. Further, since the six-month requirement it implements is itself an essentially arbitrary legislative guidepost, the *Stella* approach can do no significant violence to the central purpose of the securities laws.

Finally, I am unimpressed by the authorities plaintiff has assembled in support of its position. Plaintiff cites a number of passing judicial references to the § 16(b) six-month requirement which by labored inference might have some relevance, but none of which contains any indication that the courts or counsel in those cases gave direct consideration to this issue. Similarly, the analogies plaintiff attempts to draw to methods of time measurement in unrelated areas of law, in an apparent appeal to the need for uniformity in the system as a whole, are at best of minimal impact.

[3] I conclude that the central values underlying the doctrine of *stare decisis*—the interests of the legal system in consistency and uniformity—are fully applicable and dispositive of this issue. The *Stella* rule has been cited by virtually every important research source which might be consulted by a corporate insider in planning dealings in his company's securities under § 16(b), and no contrary authority has been presented.[1] Under such circumstances, absent a showing of significant unworkability or injustice, I must agree with defendants that they and other investors had a right to rely on an established rule of this circuit.

The motion to dismiss is therefore granted and the complaint dismissed. So ordered.

1. See, e. g., 15 U.S.C.A. § 78p(b) n. 56 (1971); 2 L. Loss, Securities Regulation 1058 (2d Ed. 1961) and 5 L. Loss, Securities Regulation 3021-22 (1969 Supp.); 2 CCH Fed.Sec.L.Rep. ¶¶ 26,101.012, 26,101.60 (1973); R. Jennings and H. Marsh, Securities Regulation 1307 (3d Ed. 1972). Nor, incidentally, have I been able to discover any movement by Congress or by the Securities Exchange Commission during the 19 years since *Stella* to change the effect of its rule.

Compare the approach of Judge Bonsal interpreting SEC rule 16b-6 for purposes of *calculating profits* due when improper short-swing transactions have been discovered. Morales v. Walt Disney Productions, 361 F.Supp. 1157 (S.D.N.Y.1973).

BEST COPY AVAILABLE

APPENDIX D

Order Extending Time to Apply for Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-922

COLONIAL REALTY CORPORATION,

Petitioner,

v.

JOHN MACWILLIAMS, JR., JAMES E. BRENNAN, and COLONIAL PENN GROUP, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1975.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 6th day
of June, 1975.

APPENDIX E

Statutes and Regulations

Section 16(b) of the Securities Exchange Act of 1934, 15 USC § 78p(b).

(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

Rule 16b-6(a) and (b) of the Securities and Exchange Commission, 17 CFR 240.16b-6(a) and (b).

EXEMPTION OF LONG TERM PROFITS INCIDENT TO SALES WITHIN SIX MONTHS OF THE EXERCISE OF AN OPTION.

(a) To the extent specified in paragraph (b) of this rule the Commission hereby exempts as not comprehended within the purposes of section 16(b) of the Act any transaction or transactions involving the purchase and sale or sale and purchase of any equity security where such purchase is pursuant to the exercise of an option or similar right either (1) acquired more than six months before its exercise, or (2) acquired pursuant to the terms of an employment contract entered into more than six months before its exercise.

(b) In respect of transactions specified in paragraph (a) the profits inuring to the issuer shall not exceed the difference between the proceeds of sale and the lowest market price of any security of the same class within six months before or after the date of sale. Nothing in this rule shall be deemed to enlarge the amount of profit which would inure to the issuer in the absence of this rule.

Rule 16a-1(e) of the Securities and Exchange Commission, 17 CFR 240.16a-1(e).

REPORTS OF DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS.

• • •

(e) Any person who has ceased to be a director or officer of an issuer which has equity securities registered pursuant to Section 12 of the Act, or who is a director or officer of an issuer at the time it ceased to have any equity

securities so registered, shall file a statement on Form 4 with respect to any change in his beneficial ownership of equity securities of such issuer which shall occur on or after the date on which he ceased to be such director or officer, or the date on which the issuer ceased to have any equity securities so registered, as the case may be, if such change shall occur within 6 months after any change in his beneficial ownership of such securities prior to such date. The statement on Form 4 shall be filed within 10 days after the end of the month in which the reported change in beneficial ownership occurs.

FILED
AUG 15 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-96

COLONIAL REALTY CORPORATION,

Petitioner,

against

JOHN MacWILLIAMS, JR., JAMES E. BRENNAN and COLONIAL PENN GROUP, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SIMON H. RIFKIND
Attorney for Respondents
John Mac Williams, Jr. and James E. Brennan
345 Park Avenue
New York, New York 10022
(212) 644-8000

RICHARD A. MESCON
JULIE KITTES HERZ

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Of Counsel

August 15, 1975

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906
(4417)

TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement of the Case	2
Reasons for Denying the Writ	3
I. The Petition Does Not Present Special and Important Reasons for the Exercise of This Court's Discretion to Review on Writ of Certiorari	3
II. The Courts Below Correctly Construed Section 16(b) of the Act	4
Conclusion	6

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-96

COLONIAL REALTY CORPORATION,

Petitioner,

against

JOHN MACWILLIAMS, JR., JAMES E. BRENNAN and COLONIAL PENN GROUP, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents John MacWilliams, Jr. and James E. Brennan submit this brief in opposition to the petition for a writ of certiorari filed by Colonial Realty Corporation to review the judgment of the Court of Appeals for the Second Circuit entered in this action on March 20, 1975.

Question Presented

Is a corporate officer or director liable under Section 16(b) of the Securities Exchange Act of 1934 (the "Act") for profits derived from a sale of his company's stock on January 1 and a subsequent purchase on June 30, or transactions consummated on similarly paired dates?

Statement of the Case

This action was brought under Section 16(b) of the Act to recover alleged profits received by defendants MacWilliams and Brennan. The district court, granting defendants' motion to dismiss for failure to state a claim, ruled that the transactions referred to in the complaint had not occurred "within any period of less than six months," the statutory period designated in Section 16(b), and that, therefore, no liability attached under that Section. The court of appeals affirmed in a *per curiam* opinion.

The complaint alleges that defendant MacWilliams, while an officer of Colonial Penn Group, Inc. ("CPG"), sold shares of that company's stock on December 20, 1972, and purchased shares on June 19, 1973. It is also alleged that defendant Brennan, while an officer of CPG, sold shares of CPG stock on December 22, 1972, and purchased shares on June 21, 1973.

These transactions were patterned exactly after the rule formulated by the court in *Stella* v. *Graham-Paige Motors Corp.*, 132 F. Supp. 100 (S.D.N.Y. 1955), *remanded on other grounds*, 232 F.2d 299 (2d Cir.), *cert. denied*, 352 U.S. 831 (1956)—a rule which has been universally accepted ever since.*

* In *Stella* the district court held that "profit realized from a purchase on January 1st and a sale on June 30th would not be recoverable under the statute." 132 F. Supp. at 104.

Reasons for Denying the Writ

I. The Petition Does Not Present Special and Important Reasons for the Exercise of This Court's Discretion to Review on Writ of Certiorari.

The sole question presented for review concerns the computation of a statutory time period. This is simply not a "novel and serious question of statutory interpretation" (Petition, p. 4) which should occupy the time of this Court.

Moreover, the proper computation of the Section 16(b) time period has been settled law since the 1955 decision in *Stella*.

Cutting through the rhetoric and scholasticism in the petition, the salient facts are these:

(1) The *Stella* rule has never been challenged or criticized by any court or commentator.

(2) Every legal research tool that an investor might consult, prominently including Professor Loss' definitive treatise, cites *Stella* as controlling authority.*

(3) Neither Congress nor the Securities and Exchange Commission has taken any action to alter the *Stella* rule nor ever called it into question.

Unlike many cases this Court is asked to consider, there is no issue raised here as to which other courts have reached conflicting conclusions. Every judge who has considered

* See the authorities cited by Judge Gurfein (App. 6a n.1).

the matter has adopted the rule of *Stella*. The Court of Appeals for the Ninth Circuit has approved the rule. *Rheem Manufacturing Co.* v. *Rheem,* 295 F. 2d 473, 475 n.3 (9th Cir. 1961).

Most recently, in direct contradiction to petitioner's assertion (Petition, p. 6) that the *Stella* principle has never been followed, *Stella* was directly and explicitly followed in *Morales* v. *Reading & Bates Offshore Drilling Co.,* 392 F. Supp. 41 (N.D. Okla. 1975). Significantly, the decision in *Morales* nowhere cites the district court decision in the case at bar and is, therefore, an independent reaffirmation of the rule enunciated in *Stella*.

Moreover, the petitioner's assertion that this Court should exercise its power of supervision because the court of appeals abdicated its responsibility to decide this question is frivolous. Of course it decided the question. The sin of which that court stands accused is that of having relied on a 20-year old decision, in its own circuit, which directly confronted and decided a narrow question concerning the computation of a statutory time period. It does not belittle the importance of Section 16(b) to say that enough of our judicial resources have already been spent on this question.

II. The Courts Below Correctly Construed Section 16(b) of the Act.

Notwithstanding petitioner's claim to the contrary, the district court did consider the merits of the rule enunciated in *Stella*. Judge Gurfein explicitly rejected the authorities and analogies offered by the petitioner (App. 6a).

The *Morales* court, though not bound to follow *Stella,* found its reasoning to be "persuasive and dispositive." 392 F. Supp. at 45. A review of Judge Dimock's analysis in *Stella* confirms that his conclusion is the result of careful statutory construction and offends no policy of the Act.

The references to a period of "six months" in the legislative history of the Act and in the cases cited by petitioner occur in contexts in which the precise measurement of the statutory period is not an issue requiring careful resolution; such references are most aptly characterized as loose or shorthand renditions of a statutory phrase which is clumsy to use and repeat *in haec verba*. The interpretation of the statutory language adopted by the courts below, and fully developed in *Stella,* is the only interpretation of Section 16(b) which gives effect to each word of the phrase "within any period of less than six months."

Petitioner is asking this Court to review a settled rule addressed to one of the narrowest and least significant issues that could possibly be raised under the federal securities laws. It seeks the reversal of a technical rule which has been followed by every court which has considered it; which has been accepted by every commentator; which raises no question relating to the policy or purpose of the Act; which both the Congress and the Securities and Exchange Commission have allowed to persist without change; and which, once decided, is best left undisturbed.

Conclusion

The petition for a writ of certiorari to review the judgment of the Second Circuit should be denied.

August 15, 1975

Respectfully submitted,

SIMON H. RIFKIND
Attorney for Respondents
John MacWilliams, Jr. and James E. Brennan

RICHARD A. MESCON
JULIE KITZES HERR

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Of Counsel

Supreme Court, U. S.
FILED
SEP 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-96

COLONIAL REALTY CORPORATION,

Petitioner,

against

JOHN MacWILLIAMS, JR., JAMES E. BRENNAN and COLONIAL PENN GROUP, INC.,

Respondents.

PETITIONER'S REPLY BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM E. HAUDEK
Attorney for Petitioner
295 Madison Avenue
New York, N. Y. 10017
(Tel.: 212-532-4800)

ABRAHAM L. POMERANTZ,
RICHARD M. MEYER,
A. ARNOLD GERSHON,

POMERANTZ LEVY HAUDEK & BLOCK
Of Counsel

September 4, 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-96

COLONIAL REALTY CORPORATION,

Petitioner,

against

JOHN MACWILLIAMS, JR., JAMES E. BRENNAN AND COLONIAL PENN GROUP, INC.,

Respondents.

PETITIONER'S REPLY BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents boldly describe the issue prescribed as "the narrowest and least significant" that could be raised under the securities laws. We submit that it goes to the very heart and vital core of § 16(b). In enacting that statute, Congress recognized that the evil of insider speculation can be stemmed only by a rigorous prohibition resting on an objective and readily applicable criterion. The six-month holding period of 16(b) is the criterion chosen by Congress. It is the pivot on which the statutory system turns. Any erosion of this crucial statutory safeguard is bound to undermine the legislative scheme so carefully designed by Congress for the protection of investors.*

---

* That § 16(b) represents a fundamental policy decision of Congress is illustrated by the fact that this Court has four times granted review of it. *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, —— U.S. —— 95 S.Ct. 1117, 43 L. Ed. 2d 392 (1975); *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 405 U.S. 1064 (1972); *Reliance Electric Co.* v. *Emerson Electric Co.*, 401 U.S. 1008 (1971); *Blau* v. *Lehman*, 366 U.S. 902 (1961).

The purpose of the provision was "to protect the interests of the public" by making difficult or impossible the use of advance corporate information; *Senate Committee on Banking & Currency*, S.R. 792, 73rd Cong., 2nd Sess. (1934), p. 9 (incorrectly referenced as *Senate Committee on Banking & Currency*, S.R. 792, 73rd Cong., 2nd Sess. (1934) p. 6 at pp. 7-8 of our petition).

The decision below should be reviewed not only because of its inroad on the statutory six-month period but, in addition, because of the wholly unacceptable method by which it achieved that inroad. The Court of Appeals decided the question before it * without casting so much as a glance at the merits of the issue. Indeed, both the Court of Appeals and the District Court took the greatest care *not* to expres agreement with the *Stella* ruling. Judge Gurfein in the District Court stated in no uncertain terms that, but for *stare decisis,* he might well have accepted plaintiff's position (Appendix 6a);** and the Court of Appeals, by adopting Judge Gurfein's opinion (Appendix 2a), adopted also this statement. The Court of Appeals thus followed *Stella* not because it thought that *Stella* was correctly decided, but regardless of whether *Stella* was right or wrong.

Such blind adherence by the Court of Appeals to a District Court ruling (which was mere dictum at that) flies in the face of an appellate tribunal's elementary duty to review the decisions of lower courts, not to accept them uncritically. Respondents have been unable to adduce a single precedent in which an appellate court deemed itself bound, by *stare decisis,* to follow the ruling of a lower court. The Court below, by its complete disregard of the merits, thus truly abdicated its most fundamental appellate duties. Before the legislative scheme enacted by Congress is thus thrown to the winds, it should receive consideration by at least one appellate court. Since the Court below withheld

* Respondents (Brief p. 4) ascribe to us the absurd contention that the Court of Appeals failed to decide the question. Of course the Court did decide it by affirming the dismissal of the complaint. The trouble lies in the *method* by which the Court reached its decision.

** The height of enthusiasm Judge Gurfein could work up for *Stella* was that he found it not "clearly in error" (Appendix 6a).

any consideration at all, the due administration of justice requires review by this Court.

Respondents' contention (Brief p. 3) that *Stella* has been "settled law" since it was decided in 1955 must be made with tongue in cheek. The law is "settled" by this Court, not by the isolated dictum of a single district judge. Respondents' suggestion (Brief, pp. 3, 5) that Congress and the SEC approved the *Stella* rule by failing to alter it borders on the absurd. The SEC had no power to alter or overrule *Stella;* and Congress certainly cannot be expected to move the legislative machinery whenever a district court renders an erroneous decision; the correction of such errors is, after all, entrusted to the higher courts.* Finally,

* It would be highly unrealistic to "expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation [of a statute];" *Jones* v. *Liberty Glass Co.,* 332 U.S. 524 (1947). Even in overruling its own decisions, this Court deems it "at best treacherous to find in congressional silence alone the adoption of a controlling rule of law * * * the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision;" *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235, 241-42 (1970); *NLRB* v. *Plasterers' Local Union,* 404 U.S. 116, 129-30 (1971).

As far as the Securities and Exchange Commission is concerned it is simply incorrect to say that it agrees with *Stella.*

SEC Rule 16a-1(e), 17 CFR 240.16a-1(e) deals with a director who buys securities while still in office but sells them after he ceases being a director; he must report the sale if it "shall occur within six months after" the purchase. The Commission thus considers the applicable period to be six full months, not one or two days less. It can hardly be suggested that, in framing these Rules, the Commission failed to focus on the precise boundaries of the statutory period. Since Rule 16a-1(e) was proposed by the Commission on April 17, 1969, Sec. Exch. Act Release No. 8574, '67-'69 CCH Fed. Sec. L. Rep. ¶ 77,684, and became effective October 20, 1969, Sec. Exch. Act Release No. 8697, '69-'70 CCH Fed. Sec. L. Rep. ¶ 77,740, the Commission obviously was aware of the *Stella* case. The only realistic conclusion is that the Commission has never viewed the *Stella* dictum as a correct statement of the law.

it is nothing short of misleading to say, as respondents do (Brief p. 5), that the *Stella* rule "has been followed by every court which has considered it"—when the District Court for Northern Oklahoma is the only court that ever followed it.*

One of the leading draftsmen of the statute, Mr. Pecora, explained to Congress that an insider may avoid liability provided his transactions are "more than 6 months apart" (Petition p. 10). This Court, in *Reliance Electric,* said precisely the same ("more than six months"; Pet. p. 12). Plainly this was not, as respondents assert (Brief p. 5), "loose" language used to avoid the literal rendition of a "clumsy" statutory phrase; for if this Court, and Mr. Pecora, had agreed with *Stella,* they could, without the least clumsiness, simply have omitted the words "more than".

And what of the statute itself which, in so many words, imposes liability irrespective of the insider's intention to hold the securities purchased "for a period exceeding six months"? Even respondents dare not call the statutory language "loose"; so they take the next best course and simply ignore the clause, in the hope that the Court will likewise overlook it. They accord the same silent treatment to the SEC regulations (Pet. p. 13), which so clearly reflect the Commission's view that the statutory holding period is six full months.

Respondents' implicit contention (adopted by the Court of Appeals) is that an error of one or two days in measuring the statutory period is not important enough to merit

---

* See *Morales* v. *Reading & Bates O. D. Co.,* 392 F. Supp. 41 (N.D. Okla. 1975). Respondents' other authority, *Rheem Mfg. Co.* v. *Rheem,* 295 F.2d 473 (9th Cir. 1961), certainly did not follow *Stella.* The Ninth Circuit, although referring to *Stella* in a footnote (p. 473, n. 3), based its decision on a ground wholly unrelated to *Stella.*

this Court's attention. However, where important considerations of policy are concerned, this Court has often devoted its attention to the precise measurement—down to the very day and hour—of time periods defined by Congress, state legislatures and constitutions, and courts. *Jones & Laughlin Steel Corp.* v. *Gridiron Steel Co.,* 382 U.S. 32 (1965) (time to appeal); *Berman* v. *United States,* 378 U.S. 530 (1964) (time to appeal); *Burnet* v. *Willingham Loan & Trust Co.,* 282 U.S. 437 (1931) (time to assess taxes); *City of Owensboro* v. *Owensboro Water Works Co.,* 243 U.S. 166, 171-72 (1917) (time of commencement of renewal period of corporate existence); *Taylor* v. *Brown,* 147 U.S. 640 (1893) (period of restraints on alienation on land held by Indians); *Town of Louisville* v. *Portsmouth Savings Bank,* 104 U.S. 469 (1881) (effective time of state constitutional amendment); *Sheets* v. *Selden's Lessee,* 69 U.S. 177 (1865) (definition of "month"); *Griffith* v. *Bogert,* 59 U.S. 158 (1856) (period of restraints on alienation against decedents' estates).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

WILLIAM E. HAUDEK,
Attorney for Petitioner
295 Madison Avenue
New York, New York 10017

ABRAHAM L. POMERANTZ,
RICHARD M. MEYER,
A. ARNOLD GERSHON,

POMERANTZ LEVY HAUDEK & BLOCK,
Of Counsel

Dated: September 4, 1975